

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:
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-v-	:
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BERNARD J. EBBERS,	S4 02 Cr. 1144 (BJS)
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Defendant.	:
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**GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT
OF APPLICATION FOR AN ORDER REGARDING VICTIM NOTIFICATION**

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-v-

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PRELIMINARY STATEMENT

The United States of America, by and through the United States Attorney for the Southern District of New York ("the Government"), respectfully submits this memorandum in connection with the upcoming sentencing proceedings for Bernard J. Ebbers, as well as the sentencing proceedings for his co-conspirators. The Government respectfully seeks an order designating this case as a case with "multiple crime victims" pursuant to Title 18, United States Code, Section 3771 (d)(2), and approving certain victim notification procedures as "reasonable" under that Section as well.

BACKGROUND

As the Court is aware, Bernard J. Ebbers and his co-conspirators, Scott D. Sullivan, David F. Myers, and Buford Yates (collectively, the "Individual Defendants"), along with Troy Normand, and Betty Vinson, were convicted of conspiracy, securities fraud, and related charges stemming from their participation in a fraud involving WorldCom, Inc., a public

company. The fraud in this case occurred from at least in or about 2000 up to and including in or about June 2002. During this time period, WorldCom had tens of thousands of shareholders. In addition, WorldCom issued publicly traded bonds, which were also held by thousands of people. Every owner of WorldCom common stock or WorldCom bonds during the relevant period is a potential crime victim in this case. Thus, there are, at a minimum, literally tens of thousands of victims of this crime. Personally notifying each of the victims will likely cost millions of dollars.

Various class action lawsuits were filed against the Individual Defendants and others. In or about August 2002, these cases were consolidated in the Southern District of New York before the Honorable Denise L. Cote and captioned In re WorldCom Securities Litigation and In re WorldCom ERISA Litigation (“Class Action Litigation”). In connection with the Class Action Litigation, plaintiffs were required to identify potential victims. The Administrator authorized by the court in connection with the Class Action Litigation undertook a detailed and thorough process to identify potential victims of the fraud at WorldCom. As a result of this process, the Administrator has identified over three million potential claimants.

The Administrator has not yet complete the process of determining the amount of compensation to which each potential claimant is entitled. This claims process will not be completed until approximately early 2006. The process of identifying potential victims and processing claims has been ongoing for approximately two years and has already cost over seven million dollars. It will cost several more million dollars to complete the process of identifying the amount of loss for each potential claimant.

The Court has scheduled sentencing proceedings for the Individual Defendants as follows:

Bernard J. Ebbers: July 13, 2005
Betty Vinson: July 25, 2005
Troy Normand: July 26, 2005
Buford Yates: July 28, 2005
David F. Myers: August 1, 2005
Scott D. Sullivan: August 4, 2004

DISCUSSION

A. Applicable Law

On October 30, 2004, the “Justice for All Act of 2004” (“the Act”) was enacted, which expanded the rights of victims and established certain requirements concerning victim notification by the Government.¹ See 18 U.S.C. § 3771(a). The Act provides as follows:

(a) Rights of crime victims.--A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.

¹ The Act defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a federal offense” 18 U.S.C. § 3771(e).

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a); see also In re Huff Asset Mgmt Co. (United States v. Rigas), __ F.3d __, 2005 WL 1322581, at *5 (2d Cir. June 3, 2005).

The Act recognizes that in cases involving large numbers of crime victims, it may be impracticable to accord all of the crime victims the rights identified in Section 3771(a). See 18 U.S.C. § 3771(d)(2). The Act provides that in such cases, “the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong proceedings.” Id.

Both the Act and the Mandatory Victim Restitution Act (“MVRA”) require that a defendant make restitution to victims when such defendant is convicted of a crime “in which an identifiable victim or victims has suffered a . . . pecuniary loss.” 18 U.S.C. § 3663A(c)(1)(B); see also 18 U.S.C. § 3771(a)(6). The MVRA further provides that “In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(f)(1)(A).

Under the MVRA, the Court need not order restitution “[i]f the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable.” 18 U.S.C. § 3664(a); see also In re Huff Mgmt Co, 2005 WL 1322581, at *7 (recognizing that restitution is not mandatory if the district court determines that the number of victims or the complexity of the issues renders restitution “impracticable”); United States v. Catoggio, 326 F.3d 323, 326 (2d Cir. 2003) (same). Thus, a sentencing court may forgo

restitution “if the court determines that imposing and administering restitution would be unduly burdensome.” United States v. Catoggio, 326 F.3d at 328; see also In re Huff Mgmt Co, 2005 WL 1322581, at *7 (upholding district court’s decision to accept settlement agreement as a reasonable substitute to restitution). MVRA further provides that restitution orders should be offset by amounts that victims recover in other litigation. See 18 U.S.C. § 3664(j)(2) (“Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in-- (A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State.”); see also United States v. Nucci, 364 F.3d 419, 423-24 (2d Cir. 2004) (relying on common law principles to hold that victims should not obtain double recovery).

B. Victim Notification In This Case

In light of the complexity regarding identification of victims in this case, and the difficulty and cost associated with notification, the Government proposes to rely in part on the list of victims gathered in connection with the Class Action Litigation. Specifically, the Government proposes the following plan for victim notification for the Court’s consideration:

(1) The Government will cause a notice (“the Notice”) of this case to be: (a) posted on the Internet at <http://www.usdoj.gov/usao/nys/victimwitness.html>; (b) sent to any victims whose identity and address has been gathered by the Settlement Administrator appointed by the Court in the class action lawsuits captioned In re WorldCom Securities Litigation and In re WorldCom ERISA Litigation, which are pending before the Honorable Denise L. Cote; and (c) distributed to the press through the issuance of a press release.

(2) The Notice will contain the following information:

a. The caption, case number, assigned judge, and names of corporate entities (if public) involved in the case for which notification is made;

b. A substantially verbatim listing of the rights provided for in Title 18, United States Code, Section 3771(a);

c. A listing of public proceedings scheduled in the case for which notification is made; and

d. The name and contact information for a United States Attorney's Office official with responsibility for addressing victims' rights.

(3) Subsequent to the posting and distribution of the Notice, the Government will update the internet posting relating to this case to reflect scheduled court and public proceedings, within a reasonable period of time of such scheduling.

(4) The Notice will specify that the Court, in order to conduct orderly proceedings and to maintain a reasonable schedule, requires advance notice no later than one week prior to any sentencing proceeding from victims who wish to be heard during any court proceeding. Based on the number of victims who provide such notice, the Court will rule on the manner in which victims will be heard at such proceedings. Similarly, the Notice will specify that any victims who object to the procedures set forth below regarding restitution must file those objections with the Clerk of the Court and serve those objections on all parties no later than one week prior to any sentencing proceeding.

The Government respectfully submits that the proposed procedures represent a "reasonable procedure to give effect to" the Act, and respectfully requests that the Court endorse the procedures as described in the proposed Order.

C. Victim Recovery In This Case

In light of the number of victims in this case, the difficulty in determining the precise amount of loss suffered by each victim, the burdensome administrative costs that would be associated with a restitution order in this case, and the MVRA's recognition that restitution orders can be offset by recovery through another Federal civil proceeding, the Government has developed the following proposal for addressing restitution in this case:

First, the Individual Defendants will enter a settlement agreement with the class action plaintiffs in the matter In re WorldCom Securities Litigation and In re WorldCom ERISA Litigation, requiring payments from the Individual Defendants into the Settlement Fund established for victims of the fraud at WorldCom;²

Second, the Government will request that the Court decline to impose an order of restitution as part of the each Individual Defendant's sentence;

Third, the Government will request that the Court impose a special condition of supervised release, requiring each Individual Defendant to comply with his or her obligations under the settlement agreements with the class action plaintiffs.

In the Government's view, this proposal is appropriate in this case for two principal reasons. First, given the length of time until the claims process in the Class Action Litigation will be completed, the Government will not be able to identify the amount of loss

² As noted in the accompanying Declaration of David B. Anders, all counsel have indicated that they are negotiating in good faith toward a resolution of pending claims in the Class Action Litigation and the execution of settlement agreements with the plaintiffs in the Class Action Litigation prior to the sentencings in this matter, which will resolve those pending claims. Also, Lead Counsel for the plaintiffs have agreed not to recover any attorney's fees out of payments made by the Individual Defendants.

suffered by each victim, as required by the MVRA, within the time period prescribed by the MVRA. Thus, this proposal eliminates the real possibility – given the number of victims and difficulty of determining the amount of loss that each victim suffered – of an invalid restitution order.

Second, it will cause the Individual Defendants to make payments to victims of their fraud without requiring the duplication of resources that would be required by a restitution order. The Settlement Administrator for the class actions has already identified over three million potential claimants and has already developed a formula for distributing proceeds to these potential victims. Thus, by adopting this proposal, the Court will allow funds to be distributed from the Individual Defendants to victims without requiring the Government to (a) identify and notify victims for itself, (b) create a separate victim compensation fund, or (c) expend additional resources administering such a fund.

The facts present here are quite similar to those that confronted the court in the Rigas case, which stemmed from an accounting fraud at Adelphia. There, the court adopted the settlement agreement proposed by the Government and the parties. The Second Circuit denied a mandamus petition, challenging that settlement agreement on the ground that victims were entitled to restitution. In re Huff Mgmt Co, 2005 WL 1322581, at *6-7. Noting that restitution was not mandatory under the MVRA in complex cases such as the Rigas case, the Second Circuit upheld the district court's decision to accept the settlement. Id. at *7-8. As described above, the Court here is faced with virtually the same circumstances as those facing the district court in Rigas. Accordingly, the proposal described above is appropriate under both the MVRA and the Act.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court issue an order authorizing the Government to proceed in the proposed manner.

Dated: New York, New York
June 7, 2005

Respectfully submitted,

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